BEFORE THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

In Re: VERIZON RHODE ISLAND	**)**	
PROPOSED TRIENNIAL REVIEW	**)**	**DOCKET NO. 3556**
ORDER TARIFF AMENDMENTS	**)**	
FILED OCTOBER 2, 2003	**)**	

VERIZON RHODE ISLAND'S INITIAL BRIEF

Verizon Rhode Island ("Verizon RI") files these comments on the briefing issues identified by the Commission at the November 7, 2003 conference concerning Verizon RI's October 2, 2003, tariff filing.[1] In that filing, Verizon RI proposed tariff changes to implement rulings of the Federal Communications Commission ("FCC") in the *Triennial Review Order*[2] that eliminated unbundling requirements for certain specified network elements. Specifically, the proposed tariff removes line sharing[3] and certain forms of interoffice facilities ("IOF") (*i.e.*, IOF dark fiber and OC3 and OC12 IOF transport) from

1 The Commission requested comments on the following issues: (1) whether the FCC preempted the Commission from imposing unbundling obligations on Verizon RI, as reflected in Verizon RI's proposed tariff amendments; (2) whether the Commission can require Verizon RI to unbundle line shared loops pursuant to Section 271 of the Telecommunications Act of 1996 and, if so, whether the Commission or the FCC would set the rates and on what basis; (3) whether the FCC's grandfathering provisions for line sharing relate to the specific end user customer, the location of the customer loop, or both; (4) whether the proposed tariff adequately reflects implementation of the grandfathering provisions for line sharing; and (5) whether Verizon RI considers the *Triennial Review Order* to be self-executing on those issues that the FCC did not expressly refer to state commissions. In addition, Verizon RI addresses arguments raised in the Complaint of Covad Communications Company ("Covad") to Suspend, Investigate, and Modify Certain Provisions of the October 2, 2003, Proposed Revisions to Verizon Rhode Island Tariff PUC RI No. 18, filed October 28, 2003. Verizon RI also responds to Conversent Communications' Motion to Intervene, filed November 17, 2003.

2 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("*Triennial Review Order*").

3 The FCC uses the term "line sharing" to describe when a competing carrier provides xDSL service over the same line that the incumbent local exchange carrier ("LEC") uses to provide voice service to a particular end user customer, with the incumbent LEC using the low frequency portion of the loop and

Tariff P.U.C. RI No. 18, Part B, Sections 2, 10 and 12, to the extent authorized by the *Triennial Review Order*.

Verizon RI's proposed tariff changes reflect the unbundling relief ordered by the FCC's *Triennial Review Order*. The FCC has eliminated Verizon RI's obligations to continue offering the above network elements on an unbundled basis under Section 251(c)(3) of the Telecommunications Act of 1996 (the "Act") and has preempted state regulatory commissions from imposing unbundling requirements for those elements. 47 U.S.C. 251(c)(3). Likewise, Verizon RI is not required to continue offering those elements under Section 271 of the Act or under state law, as some parties erroneously claim.

As discussed below, there is no lawful basis for retaining these network elements in the tariff, either permanently or on a "transitional" basis — as Covad and Conversent suggest. *See* Covad's Complaint, at 1-2; Conversent's Motion, at 3. The FCC's *Triennial Review Order* dispositively decided the unbundling issue. The CLECs' attempt to relitigate that issue before this Commission — and ignore the FCC's rulings — is unfounded. Accordingly, Verizon RI's proposed tariff amendments should be approved and allowed to go into effect immediately.

I. DISCUSSION

A. The Commission Does Not Have the Authority to Add to the List of UNEs Established by the FCC's *Triennial Review Order*.

In its Complaint, Covad dismisses the preemptive effect of the FCC's *Triennial Review Order* on state commissions and urges the Commission to reject Verizon RI's proposed tariff amendments removing the unbundling requirements eliminated by the FCC.

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the competitive local exchange carrier ("CLEC") using the high frequency portion of the loop ("HFPL"). *Triennial Review Order*, ¶ 255.

Covad's Complaint, at 11-15. Conversent makes similar arguments in its Motion. Conversent's Motion, at 2-3. The CLECs' argument that the Commission should impose unbundling obligations on Verizon RI — as if nothing has changed — contradicts the clear directives of the FCC's *Triennial Review Order* and its effect on the scope of the Commission's regulatory authority.

1. The Commission Is Preempted From Re-imposing Unbundling Requirements on the Network Elements Specifically Eliminated by the FCC's *Triennial Review Order*.

In its *Triennial Review Order*, the FCC expressly "limit[ed] the states' delegated authority to the specific areas and network elements identified in this Order." It is not the lawful prerogative of the Commission to ignore the FCC's national findings. *Triennial Review Order*, ¶ 189.

The FCC found that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers, including small entities." *Id*. at ¶ 187. As the FCC declared, "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *Id*. at ¶ 187. Likewise, state commissions may not impose additional unbundling obligations in the context of their review of interconnection agreements. *Id*. at ¶ 194. Nor can separate state unbundling requirements – assuming such authority exists under state law – serve as a justification for an examination of network elements that the FCC has decided should not be unbundled.

In its *Triennial Review Order*, the FCC determined, *inter alia*, that CLECs are not impaired without unbundled access to shared loops and certain interoffice transport facilities. *Id*. at ¶¶ 264-69, 253-54, 366, 389. It is not the lawful prerogative of this Commission to ignore the FCC's national findings. Indeed, any effort to overturn the FCC's clear preemption decision lies in the courts, not with the Commission.

Covad's and Conversent's attempt to challenge the FCC's preemptive authority to establish national unbundling requirements in this proceeding is unfounded. Covad's Complaint, at 11-15; Conversent's Motion, at 2-3. Their argument that the Commission has somehow retained the right to impose additional unbundling requirements distorts case law and the FCC's rulings in the *Triennial Review Order*.

As the U.S. Supreme Court has recognized, where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000). In other words, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns.[4] That is the case here.

In its *Triennial Review Order*, the FCC made the national policy determination not to require the unbundling of certain elements, and state commissions are not at liberty under the Supremacy Clause to frustrate or disregard that federal policy. As the FCC stated,

> We disagree with those commenters that maintain that, because we have permitted states to add UNEs to our national list in the past, we cannot limit their ability to continue to do so. Their argument ignores the clear directives Congress provided in the

[4] *See e.g., Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]").

> 1996 Act. Section 251(d)(3) preserves states' authority to impose unbundling obligations but only if their action is consistent with the Act and does not substantially prevent the implementation of our federal regime. Their argument also ignores the fact that prior Commission actions clearly had preemptive effect; as noted above, in the *UNE Remand Order*, the Commission prohibited the states from removing UNEs from the federally mandated list.

Triennial Review Order, ¶ 193. Those are the precise limitations that the FCC interpreted in concluding that state unbundling requirements should not be allowed in areas in which the FCC has explicitly rejected unbundling.

The FCC's *Triennial Review Order* also made it clear that

> [i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission [*i.e.*, the FCC] has either found no impairment — and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) — or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C).

Id. at ¶ 195. Under these clear directives, this Commission has no authority to override the FCC's determinations that the unbundling of certain network elements is not required under the Act. This would be contrary to federal policy.

The FCC has authority under Section 251(d)(3) of the Act and "long-standing federal preemption principles" to preclude states from adding to the list of UNEs established by the FCC — which does not include, *inter alia*, line shared loops and certain forms of IOF transport. *Id*. at ¶¶ 192, 264-69, 253-54, 366, 389. In fact, the FCC has exercised that authority and preempted state attempts to override its decision to remove certain network elements from the national list of UNEs.[5] *Id*. at ¶¶ 193-95.

Despite the FCC's clear rulings, Covad nevertheless relies in its Complaint on the Sixth Circuit Court of Appeals' opinion in *Michigan Bell v. MCIMetro* to support its contention that states may require access to additional UNEs "as long as the regulations do not interfere with the ability of new entrants to obtain services." Covad's Complaint, at 18. This is a grossly overbroad reading of the *Michigan Bell* decision. In that case, the "state regulation" at issue was a tariff provision that permitted CLECs to submit resale orders by facsimile. It was in that context, and that context *only*, that the Sixth Circuit determined that faxing orders did not "substantially prevent implementation" of the federal regime. *Michigan Bell v. MCIMetro*, 323 F.3d 348, 361 (6th Cir. 2003).

Nothing in *Michigan Bell* stands for the proposition that a state may require access to "services" where the FCC has expressly determined, "on a national basis, that competitors are not impaired without access" to such services. *Triennial Review Order*, ¶ 537. To the contrary, the Sixth Circuit reiterated its prior holding in *Verizon N., Inc. v. Strand* that "even in the case of a shared goal, the state law is preempted 'if it interferes with the methods by

5 It should be noted that a separate declaratory ruling by the FCC is *not* a prerequisite to preemption under Section 251(d)(3). The FCC stated that "[p]arties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) *may* seek a declaratory ruling from this Commission." *Triennial Review Order,* ¶ 195 (emphasis added). This does not relieve the states of complying with the FCC's determinations regarding the lifting of unbundling requirements for certain network elements, as set forth in the *Triennial Review Order*.

It would be unreasonable to interpret paragraph 195 of the *Triennial Review Order* as requiring that the FCC's elaborate, substantive framework be suspended until each individual piece is implemented through declaratory proceedings. Rather, the remedy of a declaratory ruling is meant to provide guidance in close cases. This is not, however, a close case. Any attempt by the Commission to impose an unbundling requirement on line shared loops and certain IOF transport would conflict with the FCC's *Triennial Review Order*, ¶¶ 192, 253-54, 264-69, 366, 389.

which the federal statute was designed to reach its goal.'"[6] 309 F.3d 935, 940-41 (6th Cir. 2002), quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). Therefore, nothing in *Michigan Bell* supports the argument that the Commission can impose additional unbundling requirements on Verizon RI or otherwise disrupt the federal framework established in the FCC's *Triennial Review Order*.

2. The Commission Has No Independent State Authority To Ignore the FCC's *Triennial Review Order* Eliminating Unbundling Requirements for UNEs Currently Included in Verizon RI's Interconnection Tariff.

The Commission has no independent authority under state law to impose additional unbundling requirements on Verizon RI, as Covad erroneously suggests. Covad's Complaint, at 12-13. Covad cites to R.I. General Law § 39-1-1, which sets forth the Commission's general regulatory powers, to support its claim that the Commission has the authority to override the unbundling determinations of the *Triennial Review Order*. Covad's Complaint, at 12. That argument is without merit.

First, regardless of the scope of the authority conferred upon the Commission under Rhode Island law, a state agency's authority under state law — whatever its scope — is restricted by the FCC's determinations of overriding federal law. This is not a question of whether state action is impliedly preempted by a comprehensive federal regulatory scheme. Here, the FCC has *explicitly* addressed (and greatly restricted) the scope of independent state

6 *See also Wisconsin Bell, Inc. v. Bie*, 2003 U.S. App. LEXIS 16514, *9 (7th Cir. August 12, 2003) ("A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law.").

authority over unbundling, and its determination is federal law that is binding on this Commission under the Constitution's Supremacy Clause.[7]

The thrust of Covad's Complaint is to urge the Commission to require Verizon RI to provide unbundled access to network elements that the FCC has specifically found are not subject to unbundling. Thus, Covad is not asking this Commission to supplement the FCC's work by creating new UNEs that were never considered by the FCC, but rather is asking the Commission to ignore the FCC's rulings on unbundling issues in its *Triennial Review Order*. While the FCC's determinations may be challenged in the federal courts (or reconsideration may be sought from the FCC itself), pending such action, those determinations are binding, and CLECs may not challenge them collaterally by urging the Commission simply to ignore the *Triennial Review Order* based on the broad regulatory authority conferred by state statute.

Second, Covad's claim that the Commission has the authority to impose unbundling requirements in this case based on Rhode Island specific facts is simply wrong.[8] Covad's Complaint, at 19-21. Covad rests its argument on the FCC's recognition that certain national unbundling determinations can be overridden by states on a "granular" review of state-specific factors, and contends that local conditions in Rhode Island warrant overriding the FCC's unbundling rules. However, the FCC did not give state commissions such a free hand. Rather, FCC authorized state commissions to conduct "granular" determinations only for

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7 Moreover, the FCC's determinations were made in response to an order of a federal appellate court that had specifically rejected the broader view of unbundling that the FCC had previously adopted. *See Iowa Utilities Board v. FCC*, 120 F3d 753, 813 (1997); *see also AT&T v. Iowa Utilities Board*, 525 U.S. 366, 388-95 (1999).

8 In addition, Covad notes that several states have independently required unbundling of the HFPL and hybrid loops. Covad's Complaint, at 16-17. However, all of the state orders that Covad cites pre-date the FCC's *Triennial Review Order* and, therefore, do not purport to interpret the FCC's findings.

particular elements (such as DS3 transport and "mass market" local switching). *Triennial Review Order*, ¶¶ 359-60, 485. Other elements, such as the HFPL and OCn transport, were subject to binding nationwide determinations, and the FCC did not authorize state commissions to conduct granular state determinations. *Id*. at ¶¶ 359-60.

Further, even in the absence of the *Triennial Review Order*, the simple fact remains that nothing in R.I. General Law § 39-1-1 confers authority on the Commission to require Verizon RI to "unbundle" its network and offer it for lease to its competitors. In Rhode Island, unbundling has always proceeded and been implemented solely and exclusively as a requirement of federal law – specifically, the 1996 Act and various FCC and court decisions interpreting that Act. At no time in its long history, either before or after the passage of the Act, has the Commission attempted to construct its own, state law, unbundling regime in Rhode Island on the basis of R.I. General Law §39-1-1.

Of course, Section 39-1-1 pre-dates the Act, and contains no language discussing "unbundling," "impairment," or even the general policy of encouraging competition in the Rhode Island local exchange telecommunications market. Nor does this statute, or any other state law, set forth any rules or standards to be applied in determining which elements should be unbundled. Indeed, the only statutory standard in Rhode Island with respect to rates is that they be "just and reasonable." *See e.g.* R.I. General Law § 39-1-1(b). The absence of any guidance from the statute regarding how, when, why or whether the Commission should require unbundling makes it crystal clear that such authority was never intended to be, and is not, granted by the statute. Accordingly, even if the FCC allowed states to re-examine unbundling obligations for certain elements under state law, there is nothing in Rhode Island law that authorizes the Commission to do so.

3. The Commission Does Not Have the Authority Under Section 271 of the Act to Override the FCC's *Triennial Review Order* By Setting Terms and Conditions for Network Elements that Verizon RI Is Not Required to Offer as UNEs under Section 251.

In its *Triennial Review Order*, the FCC recognized that former Bell Operating Companies ("BOCs") have ongoing access obligations under Section 271 of the Act. *Triennial Review Order*, ¶ 653. Covad argues that whatever conclusions the FCC reached concerning unbundled access to the HFPL under Section 251(c)(3) of the Act, unbundling can be ordered because unbundled access to the loop is a checklist requirement under Section 271. Covad's Complaint, at 9-11. That argument is seriously flawed.

First, the Section 271 checklist requirement for loops applies to "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C. § 271(c)(2)(B)(iv). Contrary to Covad's claim, that requirement does not encompass separate access to the HFPL. Covad's Complaint, at 7-9. Second, and far more important, the terms of Section 271 offerings, including issues such as "scope" and "pricing,"[9] are governed by federal law and will be determined by the FCC itself. Nothing in the Act gives this Commission any power to interpret or enforce Section 271 requirements; only the FCC may issue regulations on these matters.

In its *Triennial Review Order*, the FCC stated that "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission [*i.e.*, the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *Triennial Review Order*, ¶ 664. Thus, even if a Section 271

[9] As Covad concedes and as the FCC clearly recognized, TELRIC pricing requirements do not apply to network elements provided solely pursuant to the Section 271 checklist. *Triennial Review Order*, ¶¶ 656-59; Covad's Complaint, at 9-10.

obligation applied in this case (which it does not), the FCC — not the Commission — is the sole authority for determining the scope of that obligation and setting appropriate rates. Nothing in Section 271 gives such authority to the states. Accordingly, to the extent that Verizon RI is required to offer certain network elements pursuant to Section 271 that it is *not* required to offer pursuant to Section 251(c)(3), it will do so through federal tariffs or through commercial agreements.

In short, none of these arguments overcomes the clear holding of the FCC concerning the limitations on state authority to impose unbundling requirements that the FCC has specifically rejected. Thus, the Commission should reject the arguments that it should seek to override the unbundling framework set forth in the *Triennial Review Order* and approve Verizon RI's proposed tariff amendments, as filed.

B. Verizon RI's Proposed Tariff Changes Accurately Reflect the Rules Promulgated by the FCC's *Triennial Review Order* and Should Be Approved As Filed.

In its October 2, 2003, filing implementing the *Triennial Review Order*, Verizon RI modified existing tariff provisions regarding line shared loops and certain IOF transport. *See* Amended Tariff P.U.C. RI No. 18, Part B, Sections 2.1.1.D & E, 10.1.1.B, and 12.1.6.A. Those proposed tariff modifications accurately reflect the FCC's rules and incorporate them by reference.[10] Accordingly, the Commission should approve Verizon RI's tariff filing as written.

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[10] At its November 10th conference in this proceeding, the Commission requested that parties address the issue of whether the *Triennial Review Order* should be considered self-executing with respect to issues that the FCC did not specifically refer to state commissions, such as line sharing. As previously stated, the line sharing rules prescribed by the FCC in its *Triennial Review Order* became effective on October 2, 2003. Those new FCC rules are controlling — and self-executing — under federal law as of that date. *See Triennial Review Order*, ¶¶ 7, 700, 705. Accordingly, the Commission and all parties involved are obligated to implement the terms and conditions established by the FCC regarding line sharing (*i.e.*, the grandfathering provisions and transitional rate period, *inter alia*). This can be

1. Verizon RI's Proposed Tariff Changes for Shared Loops Implement the FCC's Rules Governing Grandfathered and New Line Sharing Arrangements, and Should Be Approved As Filed.

The rules promulgated by the FCC's *Triennial Review Order* deal quite clearly and explicitly with issues relating to "shared" loops — that is, loops which are used by the incumbent LEC for the provision of voice service, but whose "high frequency portion" is utilized by a competitive provider of DSL-based data services.[11] The FCC eliminated the requirement that incumbent LEC must provide access to the HFPL, and preempted state commission from requiring unbundling of shared loops. *Triennial Review Order,* ¶¶ 260, 264-69. The FCC expressly declined to readopt its line sharing rules, concluding that they ran counter to the goals of "encouraging competition and innovation in all telecommunications markets." *Id*. at ¶ 261. As a result, the FCC established a three-year transition period for new line sharing arrangements, and grandfathered existing line sharing arrangements until the next biennial review, scheduled for 2004. *Id*. at ¶ 264, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A).

As the FCC rules state, beginning on October 2, 2003 (the effective date of the *Triennial Review Order*), "the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element." *See id*. at Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i). The elimination of line sharing as a UNE is subject to two exceptions.

First, until the FCC's next biennial review in 2004, Rule 319(a)(1)(i)(A) grandfathers line sharing arrangements where, prior to the effective date of the *Triennial Review Order*,

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accomplished either by incorporating the applicable FCC rules into tariffs or reflecting them in interconnection agreements.

the CLEC "began providing digital subscriber line service to a particular end-user customer and has not ceased providing digital subscriber line service to that customer." *Triennial Review Order*, at ¶ 264, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A). More specifically,

> [u]ntil such end-user customer cancels or otherwise discontinues its subscription to the digital subscriber line service of the requesting telecommunications carrier, or its successor or assign, an incumbent LEC shall continue to provide access to the high frequency portion of the loop at the same rate that the incumbent LEC charged for such access prior to the effective date of the Commission's *Triennial Review Order*.

Id. Second, Rule 319(a)(1)(i)(B) gives CLECs a limited right to obtain *new* line sharing arrangements from Verizon RI for a limited transitional period and subject to certain specified terms and conditions, including a price that steadily increases toward the price of a stand-alone unbundled loop.

Verizon RI's implementation of these provisions is straightforward and fully complies with the FCC's *Triennial Review Order*. The proposed tariff states, in pertinent part, that

> Notwithstanding anything set forth elsewhere in this tariff, an existing Line Sharing arrangement over a copper Loop or Subloop will be grandfathered at existing rates provided the TC [*i.e.*, the "Telecommunications Carrier," or CLEC] began providing xDSL service to its end user customer using Line Sharing over that Loop or Subloop prior to October 2, 2003 and only so long as the TC has not ceased providing xDSL service to that end user customer over that Loop or Subloop at that location.
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> The Telephone Company shall not provision new Line Sharing arrangements pursuant to this tariff. As and to the extent

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[11] Line sharing is defined in Rule 319(a)(1)(i). All references to Rule 319 contained herein relate to the Rule as amended by the *Triennial Review Order*. *See* 47 C.F.R. § 51.319.

> required by applicable law, the Telephone Company shall provide new Line Sharing arrangements on a transitional basis pursuant to terms offered by the Telephone Company in a separate agreement subject to FCC-prescribed pricing rules.

See Amended Tariff P.U.C. RI No. 18, Part B, Section 12.1.6.A. The "existing rates" grandfathered for existing line sharing arrangements are those rates in effect as of the October 2, 2003, tariff filing date. Thus, the "existing rates" referred to in the proposed tariff are precisely those rates "charged prior to the effective date" of the FCC's *Triennial Review Order*. *Triennial Review Order*, ¶ 264.

Contrary to Covad's claims, Verizon RI's proposed tariff properly reflects the FCC's intent that grandfathering existing line sharing arrangements extend not only to a particular end-user customer, but also to the exact loop (or subloop) serving the end user and the specific customer location. Covad's Complaint, at 4. The right that the *Triennial Review Order* grandfathers - subject to the limitations set forth in the FCC's rules - is precisely "the ability to engage in line sharing *over a copper loop*;" the right, in short, relates to service provided over a particular loop. *Triennial Review Order,* at ¶ 264, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A) (emphasis added).

A location-based standard is appropriate because a loop is not an abstract connection between a customer and a telephone company that follows wherever the customer goes; rather, it is a collection of physical facilities — copper cable and supporting structures — that are enclosed in huts or other structures, buried underground, or suspended overhead; that are located at particular places and along specific routes; and that connect a particular Verizon central office with a particular customer premises. The FCC recognized that a loop is not separable from the location it serves by defining the loop UNE as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point *at an end-user customer premises*." *Id*. Therefore, when a customer's location changes, the loop that is used to serve that customer will also change — except in extremely limited circumstances — thereby ending the grandfathered rights applicable to line sharing over that particular loop. Accordingly, Verizon RI's proposed tariff language accurately implements those rights, as intended by the FCC.

Covad further misinterprets the FCC's *Triennial Review Order* regarding grandfathered line sharing arrangements, arguing that

> [t]he FCC never meant that a CLEC must have begun providing xDSL service to an end user before a line sharing arrangement became eligible for grandfathering. Rather, the only reasonable point in time to determine if a line sharing arrangement is eligible for grandfathering begins from the moment a CLEC submits an order to Verizon to provision service to an end user, not once the line sharing loop has been provisioned and the customer is actually receiving DLS service.

Covad's Complaint, at 3. Once again, Covad's argument is not with Verizon RI's tariff, but rather with the FCC's rules.

The *Triennial Review Order* clearly states that grandfathered rights apply where (among other requirements) "prior to the effective date of the [Order], the [CLEC] *began providing digital subscriber line service* to a particular end-user customer." *Triennial Review Order*, at ¶ 264, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A) (emphasis added). Any challenge to that FCC rule should be pursued by Covad in reconsideration or judicial review proceedings related to the *Triennial Review Order* itself, and not in a proceeding concerning a tariff that merely implements that Order as written. Therefore, Covad's arguments on the grandfathering provisions of Verizon RI's proposed tariff should be rejected.

Regarding *new* line sharing arrangements, Verizon RI will continue to provision Covad and others with new shared loops during the transition period, subject to the limitations imposed by the FCC's *Triennial Review Order*. *Triennial Review Order*, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A). Likewise, the rate to be charged for such arrangements will be pursuant to the rate structure established by the FCC in that Order. *Id*. at Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(B). Verizon RI's proposed tariff makes it clear that new arrangements are *not* available under tariffed terms and conditions, but rather will be provided only pursuant to separate agreements, in accordance with the provisions of the *Triennial Review Order.*

Covad argues that it is "completely unacceptable" to refer terms and conditions for new line sharing arrangements to a separate agreement process, because "CLECs may be forced to take Verizon's unreasonable position regarding basic line sharing terms and conditions and pricing that expose CLECs to numerous business risks." Covad's Complaint, at 5. Covad ignores the fact that Verizon RI would be required by its tariff changes to provide terms and conditions consistent with the FCC's pricing regulations. Thus, the only risk Covad faces is that the contractual terms will be ones that Covad, but not federal law, regards as "unreasonable." This demonstrates that Covad's argument is not with Verizon RI's proposed tariff amendments, but rather with the FCC's refusal to allow CLECs to share loops indefinitely without contributing to the recovery of their investment cost.

In addition, Covad argues that Verizon RI should specifically describe line sharing terms and conditions in its tariff because Verizon RI's standard form of interconnection agreement states that line sharing is provided in accordance with the tariff. Covad's Complaint, at 4-5. Therefore, according to Covad, "it is essential that the Commission require Verizon to tariff, in detail, all of its line sharing obligations in Rhode Island." *Id*. This is unwarranted and unnecessary.

The very contractual language cited by Covad refers to the tariff which, after the amendments at issue here become effective, will require Verizon RI to enter into a separate agreement for the provision of new line sharing arrangements in accordance with the pricing rules established by the FCC. Thus, the interconnection agreement provision, together with Verizon RI's proposed tariff changes, would give Covad precisely the rights granted to it by the *Triennial Review Order*, but none of the rights that were specifically withdrawn by that Order.

In conclusion, Verizon RI's proposed tariff implements the FCC's grandfathering rule by setting it forth explicitly in the tariff, and offers CLECs the ability to order new, non-grandfathered line sharing arrangements, in accordance with the *Triennial Review Order*'s requirements, through separate agreements. Moreover, there is no requirement to tariff Verizon RI's new line sharing obligations, which are specifically set out in the FCC's rules governing the transition period. *Triennial Review Order*, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(B).

Neither Covad nor other CLECs demonstrate any defect in Verizon RI's proposed tariff relating to either grandfathered or new line sharing arrangements. Their real objection, which they seek to conceal behind flimsy claims of inconsistency between the *Triennial Review Order* and the proposed tariff, is to the *Triennial Review Order* itself. That objection, however, must be pursued in the appropriate forums, and does not affect Verizon RI's proposed tariff amendments at issue here, which merely seek to revise existing tariff language to conform to the new rights granted and old rights withdrawn by the FCC.

Accordingly, the Commission should approve Verizon RI's proposed tariff amendments for line sharing as filed.

2. Verizon RI's Proposed Tariff Changes for IOF Dark Fiber and OCn IOF Transport Are Consistent with the FCC's *Triennial Review Order* and Should Be Approved As Filed.

In its *Triennial Review Order*, the FCC addressed the unbundling of dedicated transport facilities in some detail. First, the FCC changed the definition of the IOF element to exclude facilities that do not connect incumbent LEC switches and wire centers within a LATA. *Triennial Review Order*, ¶ 365. The FCC specifically found that

> transmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently a part of the incumbent LEC's local network. Rather, they are transmission facilities that exist *outside* the incumbent LEC's local network. Accordingly, such transmission facilities are *not* appropriately included in the definition of dedicated transport.

Triennial Review Order, ¶ 366 (emphasis added).

Second, the FCC limited the prior rules that generally required unbundling of all types of dedicated transport facilities. In the *Triennial Review Order*, the FCC found that CLECs were not impaired without OCN or SONET IOF transport facilities. *Id*. at ¶ 389. In eliminating the unbundling requirements for OCn and SONET IOF transport, the FCC stated:

> The Commission previously unbundled all transport capacities up 'through OC192 and such higher capacities as evolve over time.' We do not perpetuate such broad unbundling today. As described above, we find that requesting carriers are not impaired without lit transport beyond twelve DS3s on a route due to the ability to self-provision transport facilities, or to self-provision optronic equipment necessary to activate unbundled dark fiber. Because we find no impairment above a twelve DS3 level and transport below this level is unbundled, we need not unbundle OCn interface transmission facilities. Rather, we find that dark fiber and multiple DS3 circuits provide reasonable substitutes for OCn interface circuits at these

> capacities and find that requesting carriers are not impaired without OCn or SONET interface transport.

Id. at ¶ 389 (footnotes omitted). However, the FCC made a nationwide finding of impairment for dark fiber, DS1, and DS3 facilities and required state commissions to determine whether those findings were applicable to individual transport routes based on specified criteria. *Id*. at ¶¶ 359-60. The Commission is addressing route-specific data for these types of IOF facilities in Docket No. 3550.

Verizon RI's proposed tariff accurately reflects the FCC's stated intent. Under the proposed tariff amendments, Verizon RI would

> no longer provision new orders for IOF Dark Fiber between the TC collocation arrangements in the Telephone Company central offices and the TC's central office (Dark Fiber IOF Channel Terminations) as an unbundled network element under the terms and conditions of this tariff except as otherwise required under an effective interconnection agreement between the Telephone Company and the TC.
>
> Existing Dark Fiber Channel Termination arrangements will be discontinued on November 1, 2003, except as otherwise required under an effective interconnection agreement between the Telephone Company and the TC.

See Amended Tariff P.U.C. RI No. 18, Part B, Section 10.1.1.B. Even Conversent recognizes that Dark Fiber Channel Terminations, as defined in the proposed tariff, are a form of transport that does not run between Verizon RI switches or wire centers and, therefore is explicitly excluded from the definition of "dedicated transport" potentially subject to unbundling under the *Triennial Review Order.* Conversent's Motion, at 2. Accordingly, Verizon RI properly removed that unbundling provision from its tariff.

Likewise, Verizon RI eliminated the unbundling of certain OCn and SONET IOF transport. In particular, Verizon RI's proposed tariff states that it will "no longer provision new orders for OC3, OC12, OC48, or STS1 interoffice transmission facilities as unbundled network elements under the terms and conditions of this tariff except as otherwise required under an effective interconnection agreement between the Telephone Company and the TC." *See* Amended Tariff P.U.C. RI No. 18, Part B, Section 2.1.1.E. No party has raised any objections regarding this amendment, which implements the FCC's findings in the *Triennial Review Order*. As quoted above, the FCC expressly ruled that "requesting carriers are not impaired without OCn or SONET interface transport." *Triennial Review Order,* ¶ 389. The FCC did not give state commissions any authority to overturn or modify this non-impairment finding. Thus, Verizon RI's proposed tariff for IOF transport should be allowed to go into effect.

Contrary to Conversent's claims,[12] there is no basis for suspending these tariff amendments to allow a "transition period" during which the CLECs can find alternative ways to provision their services. Conversent's request merely seeks to freeze, for as long as possible, unbundling (and associated pricing) obligations that have now been eliminated by the *Triennial Review Order*. If Conversent were concerned with protecting its end-user customers, it would have made the necessary contingent plans and sought alternative provisioning arrangements since February 2003, when the FCC first announced the general outlines of the *Triennial Review Order*. Therefore, Conversent's request for an additional transition period is either necessitated by its own lack of action (if Conversent has not made

12 Conversent stated that "its primary concern with Verizon's tariff filing is that it discontinues the availability of certain UNEs on November 1, 2003, without considering the time it may take to enter into alternative arrangements. This could have a detrimental effect on CLECs and their customers." Conversent's Motion, at 2. Conversent further stated that "Verizon should not be permitted to unilaterally discontinue UNEs without making sure that there is a commercially reasonable period of time for CLECs to be able to plan and implement alternative arrangements." *Id*. at 3.

the necessary arrangements by now); or motivated by the desire to continue favorable pricing arrangements for as long as possible (if Conversent has already made such arrangements).[13]

In addition, the *Triennial Review Order* itself does not create the transition period right claimed by Conversent. Conversent cites no provision of that Order to support its argument. Indeed, where the FCC felt that transition periods *were* warranted, it created them explicitly, as for line sharing and mass market local switching. For other UNEs, the FCC made it clear that the only "transition" arrangements would be those imposed by particular interconnection agreements. *Triennial Review Order*, ¶¶ 700-706.

Clearly, it is not Verizon RI's intent to terminate immediately CLECs' provisioning arrangements on the effective date of the tariff. For example, with respect to OCn transport, unless Verizon RI receives an order requesting us to disconnect the circuit, Verizon RI will simply convert it to an analogous access service and CLECs will be so notified. Thus, there will be no doubt as to the CLECs' continued ability to provide service — the issue is simply whether the CLECs should continue to enjoy TELRIC pricing arrangements where the FCC has ruled that they are no longer entitled to such arrangements.

In short, Verizon RI is willing to work with CLECs interested in ordering alternative services to replace the ones being removed from the tariff. However, imposing a transition period — whether fixed or indefinite — would clearly be contrary to the FCC's clear intent to eliminate the unbundling obligations at issue, subject only to transition rights created by interconnection agreements — rights that are clearly recognized by the proposed tariff

[13] The FCC issued its public notice of the *Triennial Review Order*'s requirements on February 20, 2003. Although all of the details of the regulatory scheme were obviously not disclosed at that time, it was at least made clear that unbundling requirements would be eliminated or significantly restricted for line sharing and IOF transport. Moreover, the *Triennial Review Order* itself was released in late August 2003, almost *three months* ago. Conversent's claim that it needs even more time for its "transition" arrangements is unreasonable.

changes. No harm to end user customers would result from allowing the tariff to become effective; the only consequence would be that CLECs would no longer be able to take advantage of unbundling requirements and associated pricing arrangements that have now been explicitly rejected by the FCC.

C. Verizon RI Stands Ready to Negotiate Interconnection Agreements – or Provisions of Existing Agreements – with CLECs Regarding the Provision of These Elements.

Verizon RI's proposed tariff changes recognize that in some cases Verizon RI may have a continuing obligation to provide certain network elements pursuant to interconnection agreements, and in such cases the tariff amendments are explicit that Verizon RI does not seek to limit that right. Rather, to the extent authorized by individual agreements, Verizon RI will take the necessary steps pursuant to the contractual change-of-law provisions to reflect and implement the modified regulatory environment created by the *Triennial Review Order.* The appropriateness of this process is explicitly recognized by the FCC. *Triennial Review Order*, ¶ 700-706.

That process, however, is independent of the obligations created by the tariff. To the extent that Verizon RI has a continuing obligation to provide a particular UNE under a particular agreement, that obligation applies only to the CLEC that is the other party to the Agreement, and it is subject to all of the other terms and conditions of the Agreement. Thus, there is no reason for the generic tariff provisions to be left in place as a means of recognizing or enforcing ongoing contractual obligations. Indeed, it would be inappropriate to do so, since tariff obligations would by definition apply to all CLECs that meet the conditions of the tariff (rather than being limited to those who have rights under particular interconnection agreements), and would not be subject to the terms and conditions of any particular agreement.

Any obligations arising under interconnection agreements should be implemented through the processes specified in those agreements and by law. Any additional generic obligations arising under the tariff should be eliminated — as Verizon RI's amendments propose to do — in order to reflect the change in law implemented by the *Triennial Review Order*. Adopting Verizon RI's proposed tariff will not interfere in any way with the process of negotiating, arbitrating, and resolving disputes under interconnection agreements or impair the CLECs' statutory negotiation rights, as some erroneously claim.[14] Conversent's Motion, at 2-3. Thus, such claims are without merit.

II. <u>CONCLUSION</u>

The FCC's *Triennial Review Order* has defined the unbundling obligations for Verizon RI, and Verizon RI's proposed tariff changes accurately reflect the FCC's new framework for line sharing arrangements and certain IOF transport facilities. Nothing in the Act or state law authorizes the Commission to ignore the new federal rules or to refuse to implement them in Rhode Island. Under the Supremacy Clause, the Commission must yield to the federal framework established in the FCC's *Triennial Review Order*. Given the clear

[14] Indeed, the entire point of the negotiation process is to give the parties an opportunity to negotiate party-specific terms and conditions within the only framework of the rights and obligations created by law. It would be a distortion of that purpose to state that additional substantive rights should be given to CLECs, not because such rights are required by law, but simply to improve the CLECs' bargaining position; and it would be more bizarre still to claim therefore that *not* granting additional rights by tariff is somehow tantamount to an impairment of the negotiation process.

preemptive effect of that Order, the Commission should reject CLECs' claims and approve Verizon RI's proposed tariff changes, which comply fully with the FCC's unbundling rules.

Respectfully submitted,

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